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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1229

SAMUEL HAROLD FORD,

Petitioner

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

HEENEY, McAULIFFE AND McAULIFFE
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Your Petitioner, Samuel Harold Ford, by his attorney, Robert C. Heeney, prays that a Writ of Certiorari issue to review the judgment of the Court of Special Appeals of Maryland in the case of *Samuel Harold Ford v. State of Maryland*, on August 22, 1967, which became final on December 14, 1967, by virtue of the Court of Appeals of Maryland denying certiorari.

CITATION TO OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland, printed herein, was docketed as Initial Term, 1967, No. 295, *Samuel Harold Ford v. State of Maryland*. The Opinion was noted as "NOT FOR PUBLICATION." The final Order of the Court of Appeals of Maryland, printed herein, denying the Petition for a Writ of Certiorari to the Court of Appeals of Maryland is docketed as Court of Appeals of Maryland, Misc. Docket No. 73, September Term, 1967, December 14, 1967.

JURISDICTION

The Judgment of the Court of Special Appeals of Maryland was entered on August 22, 1967. The final Order of the Court of Appeals of Maryland denying the Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland was entered on December 14, 1967. An Information was filed against the Defendant charging him with committing an unnatural and perverted sexual practice and assault and battery. He was tried before a jury, convicted of an unnatural and perverted sexual practice and sentenced to five (5) years in the Maryland Penitentiary. The Court of Special Appeals of Maryland affirmed the judgment of the lower Court, and certiorari was denied by the Court of Appeals of Maryland. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTION PRESENTED

I. IS STATE ENFORCEMENT OF A STATUTE FORBIDDING "ANY OTHER UNNATURAL OR PERVERTED SEXUAL PRACTICE WITH ANY OTHER PERSON" A VIOLATION OF THE SIXTH AMENDMENT AS MADE APPLICABLE TO THE STATES BY VIRTUE OF THE FOURTEENTH AMENDMENT IN THAT CITIZENS ARE NOT INFORMED OF WHAT CONDUCT WILL RENDER THEM CRIMINALLY LIABLE?

CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED

(1) Sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

(2) Fourteenth Amendment to the United States Constitution:

"Sec. One. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall have abridged the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Fifteenth Article, Section 5, Maryland Constitution:

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the

Court may pass upon the sufficiency of the evidence to sustain a conviction."

(4) Twenty-Seventh Article, Section 554, Annotated Code of Maryland:

"Every person who shall be convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than One Thousand Dollars ($1,000.00), or be imprisoned in jail or in the House of correction or in the penitentiary for a period not exceeding ten years, or shall be both fined and imprisoned within the limits above prescribed in the discretion of the Court.

And in any indictment for the commission of any of the acts, hereby declared to be offenses, it shall not be necessary to set forth the particular unnatural or perverted sexual practice with the commission of which the defendant may be charged, nor to set forth the particular manner in which said unnatural or perverted sexual practice was committed, but it shall be sufficient if the indictment set forth that the defendant committed a certain unnatural and perverted sexual practice with a person or animal, as the case may be."

HOW FEDERAL QUESTION IS PRESENTED

Initially, the question was presented during trial at the close of the State's evidence by a Motion for a Judgment of Acquittal on behalf of the Defendant. The following statement was made by defense counsel at that time:

"MR. HEENEY: May it please the Court, for the record. . . I challenge the constitutionality of the statute in question because it does not give the jury

any appreciable standard by which they shall determine what is an unnatural and perverted sexual practice. . . ." (T. 41)

. . .

"MR. HEENEY: I just want the record to show that I challenge the constitutionality of the statute.

"THE COURT: The Motion is denied." (T. 42)

Thereafter, at the close of all of the evidence the defendant renewed his Motion for a Judgment of Acquittal, and same was denied.

On appeal, the Petitioner argued that the statute in question was unconstitutional because it failed to establish a standard by which the guilt or innocence of the accused could be determined. The Maryland Court of Special Appeals declared:

> "Counsel for the Appellant presented a vigorous and able argument both in his Brief and at the Hearing in this Court in support of his contention that the statute is vague, uncertain and lacks proper standards and, therefore, is unconstitutional. However, this very contention was considered, and found to be without merit, by the Court of Appeals of Maryland in *Blake v. State,* 210 Md. 459. . . .We agree with the Court of Appeals that the statute is constitutional." See *Ford v. Maryland,* Court of Special Appeals of Md., initial term 1967, No. 295, printed hereafter.

FACTS

On October 2, 1965, two boys, age 13 and 14, saw the Petitioner practicing touch football on the parking lot of a television station in Washington, D. C. The 14 year old boy knew the Petitioner and previously had attended a wrestling match with him after receiving permission from his mother. The 13 year old boy testified that the Petitioner on the day in question, purchased two six-packs of beer and then drove the boys into the State of Maryland. The 13 year old witness stated that he drank three or four beers within 45 minutes,

and on the drive the Petitioner put his hand "all over me". The boy stated that after stopping "he undid my pants and pulled them down, but didn't take them off. . .and then he undid his pants and pulled them down, and he made me masturbate him." At the same time ". . .he was doing it to me too." During this time, the 14 year old boy, in the back seat of the car, testified that he neither saw nor heard anything.

The Petitioner testified that while changing his shoes after football practice, the two boys came up and asked him for a ride in his car. During the course of the drive he stopped the car to relieve himself and upon his return found the boys drinking the beer that he had purchased earlier. Petitioner stated that later he stopped the car again for the same purpose and upon returning found the boys masturbating themselves. He said that he then "got a little excited myself" and "I masturbated myself and that is all." He denied touching either of the boys.

Following denials of a Motion for Judgment of Acquittal at the close of the State's case, as related in HOW FEDERAL QUESTION PRESENTED, and at the conclusion of the entire case (T. 66), made on the grounds that the State had failed to prove any evidence of an "unnatural act" and that the statute was unconstitutional, the Petitioner was found guilty by a jury of committing an unnatural and perverted sexual practice with another person. (It is to be noted that pursuant to the Maryland Constitution (Article XV, Sec. 5) the Jury that tried the case were the Judges of the law, as well as the facts.) He was sentenced by the Court to five (5) years in the Maryland Penitentiary. On August 22, 1967, upon the Appeal of the Petitioner, the Maryland Court of Special Appeals affirmed the judgment. On December 14, 1967, a Petition for Writ of Certiorari filed in the Maryland Court of Appeals was denied.

REASONS FOR GRANTING THE WRIT

While the Maryland Court of Appeals has previously held the statute to be Constitutional in *Blake v. State,* 210 Md. 459, 124 A.2d 273, a reading of that case would indicate that the Court was clearly wrong in holding the challenged words cover the whole field of unnatural and perverted sexual practices and fixes an ascertainable standard of guilt because what is proscribed is vague and indefinite and depends for its interpretation on the experiences of the jury without expert assistance.

This statute, without regard to the gender of the other person or to marital status, was first passed as Emergency Legislation in 1916. (See Chapter 616, Acts. of Maryland of 1916). While the intent of Article 27, Sec. 554, Maryland Code, may have been to prohibit "oral" perversion, the statute further forbids, in sweeping terms, other acts which are not specified; and it is this unknown area which causes the constitutional problem.

Masturbation is not specifically a crime in Maryland or at common law, whether done alone or with an associate, whether that associate be of the same or opposite sex. It is submitted that the questioned words provide absolutely no standard whatsoever for the layman who is concerned with not committing "any other unnatural or perverted sexual practice." In the case of *Connally v. General Construction Company,* 269 U.S. 385, 394, 46 S.Ct. 126 this Court stated that:

> "The vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another and in the futility of an attempt to apply a requirement. . . the result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aids to its construction, but upon the probably varying impressions of juries as to whether the given areas are or are not

> to be included within particular localities. The constitutional guarantee of due process cannot be allowed to rest upon a support so equivocal."

Can an ordinary person intelligently choose what course is lawful for him to pursue or what may or may not be unnatural and perverted? While it is proper for a politician to kiss a baby, if some other stranger chooses to move throughout any given neighborhood kissing babies, will he be deemed to be committing an "unnatural or perverted sexual practice", in the judgment of some?

In *State of Ohio v. Sharpe,* 1 Ohio App. 2d 425, 205 N.E.2d 113 it was held that there was a total impossibility of defining the phrase "soliciting an unnatural sex act contrary to the provision of the Ohio Code.", and that the statute was so vague and uncertain as to be unconstitutional and void. The Ohio Court noted that the sociological and biological range of sex acts is almost infinite, going from the so-called Freudian impulses, alleged by some to exist in all human behavior, to the view point that all sex acts which do not lead to the production of offspring are unnatural.

The portion of the statute under which the Petitioner was charged and convicted does not provide for government by clearly defined objective laws, but rather for government by a case to case subjective opinion reflecting the social attitudes of the particular jurors or the judge on the bench. See *Shuttlesworth v. City of Birmingham,* 382 U.S. 91, 86 S.Ct. 211.

Two cases point out the obvious vices of Article 27, Sec. 554 of the Maryland Code. In *United States v. Capital Traction Co.,* 34 App.D.C. 592, cited in *Connally v. General Construction Company, supra,* a statute prohibited operating a "crowded streetcar." The Court said:

> "There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to the conjecture, or supplied by either Court or jury. It is of the very essence of

> the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment."

And in *United States v. Reese,* 92 U.S. 214, 220, 23 L.Ed. 56, the Court said:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who could be set free."

The following colloquy between the Court and defense counsel amply acknowledges that the above noted infirmities were present in this statute.

> "THE COURT: The Legislature is pretty general with its statement when it says or 'any other unnatural or perverted sexual practice with any other person.' That could include almost anything, I suppose. It is very general.
>
> "MR. HEENEY: They have not given any standard." (T. 41)
>
> . . .
>
> "MR. HEENEY: The State has not proved by any evidence that this is unnatural.
>
> "THE COURT: The jury would have to determine that from the law. The State has proven what has taken place; the jury determines whether or not it is an unnatural and perverted act in the definition given by the Legislature." (T. 41)

Where is the definition referred to by the Court? Without expert testimony, what *expertise* did the judge or jury have upon which to base the judgment of what the Legislature meant by the term or what the community determined was meant to be prohibitive? Was not the net thrown, and then left to the jury to step inside and say who could be rightfully detained and who should be set free? The statute's lack of a definite standard in its sweeping clause also has an additional vice in that it is ex post facto in nature, its

meaning not being clear until interpreted by the Court after the commission of the act in question.

While mutual masturbation may or may not be a recommended sexual practice, "It is the statute, not the accusation under it that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618.

> "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." See *Lanzetta v. New Jersey, supra.*

CONCLUSION

Therefore, certiorari to the Maryland Court of Special Appeals should be granted in order to establish for the States that criminal statutes must have definitive standards so that all who read them shall know with certainty whether their conduct is criminal or permissive.

Respectfully submitted,

HEENEY, McAULIFFE AND McAULIFFE

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IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Initial Term, 1967

No. 295

SAMUEL HAROLD FORD

v.

STATE OF MARYLAND

Anderson
Morton
Orth
Thompson
Prettyman, Daniel T.
(specially assigned)

JJ.

PER CURIAM

Filed: August 22, 1967

The Appellant, Samuel Harold Ford, a thirty-eight year old married man, a television engineer, with a child born of the marriage and living with his wife, was accused of engaging in mutual masturbation with a thirteen year old boy, in violation of Maryland Code Art. 27, Sec. 554, which proscribes unnatural and perverted sexual practices. He was tried before a jury, convicted and sentenced to five years in the Maryland Penitentiary.

In this appeal he contends:

1. The statute is unconstitutional because it fails to establish a standard by which the guilt or innocence of the accused may be determined.

2. If the statute is constitutional, then expert testimony is required to determine what conduct constitutes an "unnatural and perverted sexual practice."

3. The sentencing judge erred in conferring with the father of the prosecuting witness without counsel for the Appellant being present.

According to the record, two boys, aged thirteen and fourteen, saw the Appellant practicing touch football on the parking lot of a television station in Washington, D.C. The fourteen year old boy knew the Appellant and previously had attended a wrestling match with him. The thirteen year old boy testified that the Appellant, on the day in question, purchased two six-packs of beer and then drove the boys in his Cadillac automobile into Maryland. The thirteen year old witness stated that he drank three or four beers within forty-five minutes and that during the drive, the Appellant "put his hand all over me while he was driving." After stopping, "he undid my pants and pulled them down, but he didn't take them off * * * and then he undid his pants and he pulled them down and he made me masturbate him." At the same time "* * * he was doing it to me too." At this time, the fourteen year old boy was in the back seat of the car and testified that he neither saw nor heard anything.

The Appellant testified that he had purchased a six-pack of beer and had it in his car for use after football practice; that about 6:00 p.m., while changing his shoes, the two boys came up and asked him for a ride in his car. During the course of the drive he stopped the car to urinate and upon his return he found the boys drinking the beer. Later he stopped the car again for the same purpose and upon returning found the boys masturbating themselves. When questioned by the Appellant, they asserted that they were members of a "Homo [sic] club at school." The Appellant said he then "got a little excited myself" and "I masturbated myself and that is all." He denied touching either of the boys.

At the conclusion of the State's case, the Appellant made a motion for judgment of acquittal on the grounds that the State had failed to prove any evidence of an "unnatural act" and that the statute was unconstitutional. The motion was denied. It was renewed at the conclusion of the entire case and again denied.

Counsel for the Appellant presented a vigorous and able argument both in his brief and at the hearing in this Court in support of his contention that the statute is vague, uncertain and lacks proper standards and, therefore, is unconstitutional. However, this very contention was considered, and found to be without merit, by the Court of Appeals of Maryland in *Blake v. State*, 210 Md. 459. There, Judge Henderson (later Chief Judge) stated:

> "The Appellant contends that the statute is vague and uncertain and fails to fix an ascertainable standard of guilt. We find no merit in the contention. Penal statutes should be expressed in language as specific as the subject matter will permit, but it is obviously impossible to define some types of crime by a detailed description of all possible cases that may arise. *State v. Magaha*, 182 Md. 122. The words of a statute must be accorded the meaning naturally given them in ordinary usage. *Glickfield v. State*, 203 Md. 400, 403; *Jones v. State*, 207 Md. 481, 488. It is true that section 627 [now section 554] has not heretofore been attacked on this particular ground, although there have been convictions under it. See *Berger v. State*, 179 Md. 410, and *Haley v. State*, 200 Md. 72. But it would appear that similar statutes in other states have been universally sustained. See *Jaquith v. Commonwealth*, 120 N.E. 2d 189 (Mass.); *State v. Anthony*, 169 P.2d 587 (Ore.); *State v. Brazell*, 269 P. 884 (Ore.); *People v. Coleman*, 127 P.2d 309 (Cal. App.); *State v. Farmer*, 148 P.2d 1002 (Ariz.).
>
> * * * * * *
>
> We find in the language employed a clear legislative intention to cover the whole field of unnatural and perverted sexual practices. We think it was unnecessary to describe in detail practices which are matters of common knowledge."

Based upon the foregoing compelling statement, we agree with the Court of Appeals that the statute is constitutional.

II.

Likewise, we are of the opinion that the Appellant's contention that expert testimony is required to determine what conduct amounts to an "unnatural sex act" is without merit.

Ordinarily, expert testimony is not admissible on matters within the common knowledge and experience of individuals of ordinary judgment and experience. It is only admissible "when the formation of a rational judgment from the facts requires special training or skill", *Empire State v. Guerriero*, 193 Md. 506, 514-515, although the matter is one largely within the discretion of the trial court, subject to appellate review. *Andrews v. Andrews*, 242 Md. 143.

The Court of Appeals, in *Blake, supra*, was of the opinion that unnatural sex "practices which are matters of common knowledge" need not be described in detail in the statute.

Since the practices are matters of common knowledge, the testimony of an expert was not required to aid the jury in determining the unnatural sex practices contemplated by the statute. Accordingly, there was no abuse of discretion by the trial court in refusing to require the State to produce expert testimony.

III.

In the course of imposing sentence, the trial judge made the following statement:

> "I have had a very thorough probation report made on you, and in connection with that probation report I made it a point to direct the probation officer to confer with the fathers of these two young men. I likewise conferred with one of the fathers, and I am sorry to report that that experience in talking to the father of one of these young men makes the case one of a very, very serious nature in that this young man, the one who testified, and the one who was the principal witness in the case, whether or not the father can rectify the harm that you have done I doubt very seriously."

Counsel for the Appellant asserts that he was not aware of the Court's conference with the father of one of the boys until it was announced at the time of sentencing. It is contended that the action of the trial judge in communicating with the father, out of the presence of the Appellant's attorney, constituted reversible error.

In *Driver v. State,* 201 Md. 25, 31, Judge Delaplaine expressed the latitude which is accorded a judge in determining the sentence to be imposed:

> "To aid the sentencing judge * * * the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the kind of sentence that should be imposed. *In such cases, however, any information which might influence his judgment, which has not been given in his presence, should be called to his attention, or to the attention of his counsel, without necessarily disclosing the sources of such information, so that he may be afforded an opportunity to refute or discredit it."* (Emphasis added).

It is apparent, therefore, that a judge is accorded wide latitude in seeking sources of information which will enable him to impose an appropriate sentence. Fundamental fairness, however, compels that the Appellant or his counsel be afforded an opportunity to controvert factors which may influence the judge's determination of the sentence. Cf. *Costello v. State,* 237 Md. 464.

In this instance, the Appellant had an opportunity to examine the pre-sentence report prior to imposition of sentence, which report indicated that the investigating officer had communicated with the fathers of the boys. Fortified with this knowledge, both Appellant and his counsel had an opportunity to counter, as they saw fit, any influence which they deemed the communication with the fathers might have had upon the sentencing judge.

It is true that the sentencing judge went beyond the action of the investigating officer and conferred directly with one

of the fathers, and that this was not known by the Appellant or his counsel until moments before sentence was imposed. While this was not a commendatory procedure, we do not think it was so prejudicial to the Appellant as to vitiate the sentence or to require a new trial, especially where there was time, however short, to request a deferment of sentence, and however reluctant the Appellant's counsel may have been to make such request for fear of possibly irritating the sentencing judge.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY
APPELLANT.

SAMUEL HAROLD FORD	)	IN THE
	)	COURT OF APPEALS
	)	OF
v.	)	MARYLAND
	)	Misc. Docket No. 73
STATE OF MARYLAND	)	September Term, 1967
	)	
	)	(No. 295 - Initial Term, 1967
	)	Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ Hall Hammond
Chief Judge

Date: December 14th, 1967.